Volume 21 | Number 2 Article 6

2-1-1943

Constitutional Law -- Racial Discrimination -- Discriminatory Salary Schedules of Negro Schoolteachers Prohibited by Fourteenth Amendment

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lic service company, or any complainant. Indiana[18] allows appeal by any person, association, or city adversely affected. In Oklahoma, a constitutional provision[19] gives the right of appeal to any corporation affected, any person deeming himself aggrieved, or the state.

It seems improbable that the North Carolina legislature intended to limit the right of appeal as it was limited in the principal case. As is pointed out above, it appears that the best law is against that holding.[20*] However, the precedents to which the courts must look for guidance in construing the statutes being as conflicting as they are, it would seem advisable for the legislature to change the law so as clearly to give the right of appeal to either the defendant corporation, the state, or any affected person appearing before the commission and participating in the hearing regardless of a showing of a property interest.

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Constitutional Law—Racial Discrimination—Discriminatory Salary Schedules of Negro Schoolteachers Prohibited by Fourteenth Amendment

Plaintiff, a negro schoolteacher, brought an action for a declaratory judgment as to the legality of the action of the Board of Education of Nashville, Tennessee, in setting up different schedules of compensation for white and colored teachers of the same professional rating, for injunction against such future discrimination, and for past salary alleged to be due on the basis of the difference between the white and the colored schedules. The federal district court made findings of fact that the board had followed the schedules, that the only basis for the different scales was race or color, and held that such a distinction was a denial of equal protection of laws and so violated the Fourteenth Amendment. The declaratory judgment and the injunction were granted, but recovery of back salary was denied because the negro plaintiff had accepted the smaller amount in the past without protest.[1]

The instant case provides one more step in the slow advancement of

[18] Acts of Indiana 1927, c. 258, §1.

[19] OKLA. CONST., Art. IX, §20.

[20*] Corporation Commission v. Camnon Mfg. Co., 185 N. C. 17, 116 S. E. 178 (1923). The Southern Power Co. petitioned the Corporation Commission to fix reasonable rates. On the filing of the petition, the commission had notices issued and served on all customers under contract with the petitioner. Various customers appeared and objected to the proposed rates. From the commission's decision, the customers were allowed an appeal. (Appeal dismissed on other grounds.)

In State *ex rel.* Board of Railroad Commissioners v. Wilmington and Weldon R. R. Co., 122 N. C. 877, 29 S. E. 334 (1898), the petitioners had begun a proceeding before the commission to require the railroad to build a station. From the commission's finding, the petitioners appealed directly to the supreme court. It was held that the appeal would lie to the superior court and then to the supreme court.

[1] Thomas v. Hibbitts, 46 F. Supp. 368 (M. D. Tenn. 1942).

the negro in the South as a result of the protection afforded by the Fourteenth Amendment to the Constitution.[2] The question presented here, however, is not a new one. It first arose in Maryland in 1939, where a negro teacher sought to enjoin the enforcement of a state statute setting up similar discriminatory salary schedules. Although the case was first dismissed for want of parties,[3] the court on second suit granted an injunction to the extent the statute authorized and the board of education carried out a purely racial discrimination.[4*] The court, recognizing the possibility of differences in the individuals themselves, said that salaries for the two races did not have to be equal, but that it would be hard to find any legal justification for paying a negro teacher less than the minimum required for a white teacher of the same standard professional qualifications and experience, for such difference in pay would seem to be clearly based solely on race or color. Herein seems to lie the whole crux of the problem, for where, as here, there are definite professional standards by which the worth of the teacher may be measured, an almost prima facie case of racial discrimination arises, whereas if the standard was that of the skill or innate ability of the individual teacher such a discrimination would be less apparent.[5*] The doctrine of the Maryland case has been incorporated into two other decisions besides the instant case[6*] so that it would now appear to be settled law that wherever a county or state board of education sets up different salary schedules for white and colored teachers there is a prima facie case of discrimination solely on the basis of race or color.

In the instant case, the defense argued that the different economic positions of the white and colored teachers, which allowed the latter to

[2] U. S. CONST. AMEND. XIV, §1.

[3] Mills v. Lowndes, 26 F. Supp. 792 (D. Md. 1939). This action was brought against the members of the state board of education, and the court held that although the state fixed the basic salary schedules the county board of education was an indispensable party to the suit because it administered them.

[4*] Mills v. Board of Education of Anne Arundel County, 30 F. Supp. 245 (D. Md. 1939). The court refused to declare the state statute unconstitutional on its face, for it was the county practice rather than the mere terms of the statute which prejudiced the plaintiff. This was on the theory that the state only fixed the minimum salaries and the actual salaries were in the discretion of the county board. It would seem that since the payment of teachers' salaries is generally a local matter any suit of this nature would have to join the county board of education as defendant.

[5*] See Notes (1940) 27 VA. L. REV. 245, (1940) 3 LA. L. REV. 232, (1941) 1 BILL OF RIGHTS REV. 142 to the effect that cases involving discriminations as to teachers salaries should not be precedents for holding unconstitutional any wage discriminations against non-professional groups.

[6*] Alston v. School Board of City of Norfolk, 112 F. (2d) 992, 130 A. L. R. 1506 (C. C. A. 4th, 1940). The action was dismissed in the district court on the ground that the plaintiff's entry into a contract with the school board to teach for a year at a fixed price constituted a waiver of such constitutional rights as he was seeking. The court held that if the rights were waived it was only for the term of the contract and thus the question was still pertinent as to future rights. McDaniel v. Board of Public Instruction, 39 F. Supp. 638 (N. D. Fla. 1941).

live more cheaply, and the fact that colored teachers were more numerous and could be employed at lower salaries, justified the lower rates of pay. This defense was recognized as being good in the abstract, but the court gave considerable import to the fact that even though the use of colored teachers would be more economical there was no showing that they were used in white schools, and therefore the defense was held invalid.[7] Such would still seem to be so even if the teachers were used interchangeably, for then, in addition to the same professional qualifications, there would be the same type of work, making a stronger case for equal pay. Also there is no sociological justification for giving legal significance to the fact that the negroes' low standard of living allows them to live more cheaply, and it would seem that the Fourteenth Amendment should extend to the prevention of any state action which tends to perpetuate a negro standard of living which is lower than that of whites. The increasing importance of the state as an employer, which results in employment of many different types of labor,[8] intensifies this need for racial protection.

There seem to be no cases involving a state discrimination as to wages of other kinds of workers.[9*] This is probably due to the fact that there is no other definite class which includes both colored and white persons where such definite wage scales are set up. However, the budgetary problems of the counties require the setting up of these wage rates. If the counties changed from these schedules based on education and years of experience to some standard less objective, or even dropped the schedules entirely, the prima facie case of discrimination would seem to disappear. Proof of discrimination would then probably require a showing of systematic and continuous differences in the wages, or that the colored teachers were not being paid on substantially the same basis as the whites.

The first of these proofs would be analogous to the test set up in determining whether due process has been denied in the trial of a negro

[7] Thomas v. Hibbitts, 46 F. Supp. 368, 370 (M. D. Tenn. 1942).

[8] See Note (1940) 53 HARV. L. REV. 669 discussing the limitations on the state as an employer under the Fourteenth Amendment.

[9*] The only cases analogous in this respect to the instant decision involve limitations placed by the state or its municipalities upon the letting of a public contract. In Heim v. McCall, 239 U. S. 175, 36 S. Ct. 78, 60 L. ed. 218 (1915), the court held that a statute providing that a public contractor could not hire aliens was constitutional as a proper exercise of control over public works. Also see Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124, 51 L. ed. 1047 (1903) to the effect that a state could insert hour limitations into public contracts, and People v. City of Chicago, 278 Ill. 318, 116 N. E. 158 (1917) where it was held constitutional for a board of education to deny employment to teachers who were union members. These cases seem to be contrary to the attitude of the teachers' salary cases in that they allow the state to impose restrictions on the hiring of public employees without considering such restrictions a denial of equal protection of the laws.

defendant before a wholly white jury. In such case it must be determined whether there has been a long continuous, systematic and arbitrary exclusion of the negroes solely on the basis of race or color, and not whether there was an exclusion of negro jurors at that particular trial.[10*]

The second method of showing discrimination would seem to more closely follow the test set up by the courts as to whether there has been a violation of the Fourteenth Amendment by discrimination between white and colored children in other fields of education. The question there is not whether the facilities provided for each are actually equal, but whether they are substantially equal. The leading case on this point is *State of Missouri* ex rel. *Gaines v. Canada,* in which the Supreme Court of the United States held that the state of Missouri was bound to furnish within its borders facilities for negro legal education substantially equal to those which it there afforded the white race, whether or not any negroes other than the plaintiff sought the same opportunity.[11] This case, however, may be somewhat limited in its application of the substantial equality doctrine in that at the time of the suit there was no intrastate legal education for negroes provided by the state at all, and thus the court did not go into a comparison of facilities. The extent of the holding was that scholarships to law schools without the state were not sufficient to meet the requirements of substantial equality. In this respect the decision may be strengthened by the interpretation placed upon it by the Supreme Court of Missouri on remand that the law school facilities for negroes at Lincoln University would have to be substantially the same as those provided for whites by the beginning of the next term.[12*] This opinion was respected in a later federal case in announcing that the opinion in the *Gaines* case "did not deprive the state of a reasonable opportunity to provide facilities demanded for the first time, before it abrograted its established policy of segregation."[13*]

[10*] Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579, 79 L. ed. 1074 (1935). Even though there were no definite schedules set up, it would seem that if the plaintiff could show that for a long time there had been systematic wage differences he would have a case of discrimination under the Fourteenth Amendment.

[11] 305 U. S. 337, 59 S. Ct. 232, 83 L. ed. 208 (1938); *accord,* Pearson v. Murray, 169 Md. 478, 182 Atl. 590, 103 A. L. R. 706 (1936) holding that where Maryland provided for outside scholarships there was a denial of substantial equality.

[12*] State *ex rel.* Gaines v. Canada, 344 Mo. 1238, 131 S. W. (2d) 217 (1939). Since the rendition of the *Gaines* decision the state had enacted legislation charging the curators of the negro institution of higher education, Lincoln University, with a mandatory duty to erect any additional buildings and provide for any additional facilities which might be requested. This new statute probably influenced the court to allow a reasonable time for the school to provide the facilities before a mandamus could be obtained which would permit the petitioner to enter the white law school.

[13*] Bluford v. Canada, 32 F. Supp. 707 (W. D. Mo. 1940). The negro plaintiff had been denied admission to the graduate school of journalism at the University

The doctrine that the facilities provided for white and colored children must be substantially equal has also been widely recognized throughout those states which follow a policy of racial segregation for educational purposes. The rule is well stated in a leading Kansas case: "Any classification which preserves substantially equal school advantages is not prohibited by either the state or the federal Constitution, nor would it contravene the provisions of either."[14] Under this doctrine, where the negroes had to walk a greater distance to school than the whites,[15] where a new building was being erected for white students but not for colored,[16*] where a negro girl was not allowed to room in the same Home Economics House with the white students,[17*] and where the negroes were given no representation on the board of education of the district,[18] it was held that the facilities were substantially equal and thus no discrimination existed. On the other hand, where the colored and white children attended school for the same total number of years, but different numbers of years were allotted to grammar, junior high, and high schools,[19*] where the curriculum in the white school included

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of Missouri (white) and was bringing action for damages against the registrar. There was, however, no allegation in the complaint of application and refusal at Lincoln University (colored) before the suit was brought, and the court said such demand and refusal would have to be shown before there could be any recovery. The court considered that the opinion in the *Gaines* case should not imply that the state had to abrogate its racial segregation policy for the short time required to set up the negro facilities.

[14] Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274 (1903).

[15] Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765, 11 L. R. A. 828 (1891); *accord,* Dameron v. Bayless, 14 Ariz. 180, 126 Pac. 273 (1912).

[16*] Lowery v. School Trustees, 140 N. C. 33, 52 S. E. 267 (1905). Since there were 307 white children and only 68 colored children it was found that the erection of the building for additional accommodation of white children was necessary, but that the building for colored children was amply sufficient and commodious.

[17*] State v. Board of Trustees, 126 O. St. 290, 185 N. E. 196 (1933). The plaintiff was offered quarters and opportunity to pursue her residence service in such house in one of its compartments which was furnished and equipped in an equivalent and similar manner as the compartments which she wanted to enter with the white students, and the court held that she was not being denied educational, but merely social, privileges. In Jones v. Newlon, 81 Col. 25, 253 Pac. 386, 50 A. L. R. 1263 (1927), it was held that exclusion of colored pupils from the swimming pool and entertainments and other social functions was a violation of a Colorado constitutional provision that no classification of pupils should be made because of race or color; *accord,* Patterson v. Board of Education of City of Trenton, 11 N. J. Misc. 179, 164 Atl. 892 (1933), *aff'd,* 112 N. J. L. 99, 169 Atl. 690 (1934). It would seem then that in states which do not follow a policy of segregation mere separations as to social functions would constitute illegal discrimination.

[18] State v. Albritton, 98 Okla. 158, 224 Pac. 511 (1924). It was held that even though there was a majority of negro students in the district the determination of whether the board was to be composed of white or colored members was in the discretion of the superintendent of schools, and since there was no showing that the action of the superintendent resulted in unequal accommodations, there was no violation of the Fourteenth Amendment.

[19*] Graham v. Board of Education of Topeka, 153 Kan. 840, 114 P. (2d) 313 (1941). The court went into the method of teaching in each of the schools, showing that the junior high school for white children was departmentalized and had different teachers for each course, but that such was not the case in the

mechanical and other special instruction not given in the colored school,[20] where the county was authorized to establish one agricultural high school for white youth and support it by a tax on all taxable property,[21] and where the negro children had to cross dangerous railroad tracks to get to school,[22] it was held that there were such substantial inequalities as constituted a racial discrimination. From these cases it is seen that, given a policy of segregation of races by the state for education, compliance with the Fourteenth Amendment depends upon whether the facilities provided for each race are substantially the same. The courts also seem to apply this criterion in all the teacher salary cases. They evidently recognize that even though a definite schedule exists the individual salaries need not be exactly equal, but that a discriminatory schedule would show prima facie that the wage classification is determined by race or color and thus that a violation of the substantial equality doctrine would exist. If then there were no schedules, the negro plaintiff would have the burden of showing that his wages were not being determined in substantially the same way as those of the white teachers. The proof of such contention would require consideration of the ability, efficiency, skill, experience and educational qualifications of the individual teacher and the type of students and courses taught, whereas the salary schedules are based solely upon his experience and education.

North Carolina has a constitutional provision which requires that the races shall be separated for purposes of education, but that there shall be no discrimination against either,[23] and such segregation has long been the policy of the state.[24*] This provision has been recognized as not requiring exact equality of school advantages, but only that the facilities be substantially the same in view of the varying needs of the two races.[25*] North Carolina then would seem to be in accord with

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negro seventh and eighth grades. See Note (1942) 10 J. B. A. KAN. 285 discussing the tendency of Kansas to require absolute rather than substantial equality.

[20] Jones v. Board of Education, 90 Okla. 233, 217 Pac. 400 (1923).

[21] McFarland v. Goins, 96 Miss. 67, 50 So. 493 (1909).

[22] Williams v. Board of Education, 79 Kan. 202, 99 Pac. 216 (1908).

[23] N. C. CONST., Art. IX, §2. ". . . and the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race."

[24*] Although the constitutional and statutory provisions relate only to public schools, it has been the policy to extend them to higher education also. N. C. CODE ANN. (Michie, 1939) §5384. See Note 17 N. C. L. REV. 280 (1939).

[25*] Lowery v. School Trustees, 140 N. C. 33, 52 S. E. 267 (1905). The doctrine which requires facilities and advantages to be substantially equal was probably first recognized by the North Carolina court in McMillan v. School Committee, 107 N. C. 609, 615, 12 S. E. 330, 331 (1890) where it quotes from an Ohio case which advanced the doctrine. In two earlier cases, Pruit v. Commissioners, 94 N. C. 709 (1886), and Rigsbee v. Durham, 94 N. C. 800 (1886) the court held that where the poll and property taxes collected from whites were to be devoted to sustaining schools for white persons, and the taxes collected from negroes were

most other states in this respect, and should a case arise in its courts involving salary discriminations between colored and white teachers it would be possible to decide the case under the substantial equality doctrine.

The problem of the instant case is still very much alive throughout the Southern states, for statistics of comparative colored and white teachers' salaries for 1935-1936 in seventeen states show that for every $1.00 paid to white teachers only about $.50 was paid to colored.[26] North Carolina seems to be somewhat more liberal than the average, the ratio at that time being $.67 to the negro per $1.00 to the white,[27] and in 1940-1941 $.79 to the negro for each $1.00 per white.[28*] The general policy of North Carolina evidently seeks to bring about an equalization of teachers' salaries,[29*] but there is still some room for improvement. It would seem that unless complete minimum equalization is achieved a suit for injunction against such discrimination is likely to arise which, if successful, would impose a critical and sudden strain on the educational budget. C. D. HOGUE, JR.

Mortgages and Deeds of Trust—Statute of Limitations Barring Foreclosures and Right of Redemption—Nature of Possession Required

Civil action in ejectment.[1] The facts were agreed to be as follows: The plaintiff, in the year 1925, executed a deed of trust securing notes made by him for the balance due on the purchase price of the land covered by the trust deed. The last of the notes matured in 1928. In 1938, more than ten years after the maturity date of the last note, the trustee foreclosed and conveyed the land to defendant by exercising the power of sale contained in the trust instrument. No payment of either principal or interest was ever made on any of the notes.

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to be used for colored schools, the tax was discriminatory and void under the state constitution.

[26] *Special Problems of Negro Education* (Wilkerson, 1939). Prepared for Advisory Committee on Education, Staff Study Number 12. Published by United States Government Printing Office, p. 24, Table.

[27] *Ibid.*

[28*] *State School Facts* (Feb., 1942), Vol. XIV, No. 5, Table II. From this table it is seen that there has been a continuous increase in all salaries throughout the years and also a more rapid increase in negro wages than in white wages. There has thus been a tendency to equalize the salaries. This table does not show the exact situation, for it only covers salaries paid from state funds, and those paid by the individual counties might make some difference.

[29*] See Greensboro Daily News, June 12, 1942, §1, p. 12, col. 2, stating that there was a $242,000 appropriation in 1942 for the purpose of furthering the equalization of teachers' salaries, and that the State School Commission hopes to have all differences between colored and white teachers' salaries abolished within two or three years.

[1] Ownbey v. Parkway Properties, Inc., 222 N. C. 54, 21 S. E. (2d) 900 (1942).